A **JACOB AND TORALF CONSULTING SDN BHD & ORS**

v.

B **SIEMENS INDUSTRY SOFTWARE GMBH & CO KG & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: S-22-129-2009]
C 30 AUGUST 2013

ARBITRATION: *Confidentiality - Documents - Second to fifth defendants not party to arbitration proceeding - Documents used in arbitration proceedings between plaintiff and first defendant exhibited in*
D *affidavit - Expunging of - Application for - Whether documents produced or created for arbitration were confidential in nature - Principle of privacy - Whether third parties precluded from using documents generated in arbitration proceedings - Whether consent of parties or leave of court obtained*

E ***CIVIL PROCEDURE:*** *Affidavits - Expunging of - Application for - Documents used in arbitration proceedings between plaintiff and first defendant exhibited in affidavit - Whether documents produced or created for arbitration confidential in nature - Principle of privacy - Whether*
F *third parties precluded from making use of documents generated in arbitration proceedings - Whether consent of parties or leave of court obtained*

The plaintiffs applied to expunge a document ('the impugned document'), which was exhibited to an affidavit deposed on behalf
G of the second to the fourth defendants and a further affidavit deposed on behalf of the fifth defendant. The impugned document was the plaintiffs' claim in arbitration proceedings with the first defendant. *Vide* encls. 187 and 190, the plaintiffs applied for the following orders, *ie*, (i) that para 17 of the affidavit of Yau Her
H Lerk exhibiting the impugned document to be expunged; and (ii) that para 13 of the affidavit exhibiting the affidavit of Yau Her Lerk and the impugned document to be expunged. In brief, the plaintiffs' main suit herein was premised on an allegation of fraudulent misrepresentation and it was alleged that they were
I induced to consent to a settlement agreement with the first

defendant based on certain misrepresentations made by the other defendants in this suit. The settlement agreement contained, *inter alia*, an arbitration clause. Contentions arose when the second to the fifth defendants filed separate applications to stay the proceedings against them pending the outcome of the arbitration proceedings between the plaintiffs and the first defendant. It was alleged that the arbitration proceedings and the present suit raised similar issues and therefore, overlapped. Thus, the impugned document was exhibited to illustrate the situation. In light of this, the plaintiffs argued that at common law, arbitration proceedings were private and as such, all documents produced or created for the purpose of arbitration were confidential in nature and could not be used by third parties. It was further alleged that since the impugned document was a private document created by the plaintiffs for arbitration, the defendants who were not parties to the arbitration required prior leave of the court to use the impugned document in this proceeding. On the other hand, the defendants argued that the information in the impugned document was similar to the plaintiffs' statement of claim in this suit and was no longer confidential information. It was further contended that the only purpose for disclosing the impugned document was to show that the proceedings before this court and before the arbitral tribunal were similar that there was a clear risk of inconsistent decision if a stay was refused.

Held (allowing encls. 187 and 190 with costs):

(1) One of the attractions of arbitration is its privacy and this benefit would be negated if third parties were allowed to use documents created for use at these proceedings without any limitations. A principal reason as to why parties to a contract have chosen arbitration was to ensure that the dispute is heard in private and remains private in all aspects. On the facts, the impugned document was a pleading in the arbitration. A pleading setting out the party's case was an inherent part of a process that is private and not public. It was acknowledged in *Esso Australia Resources Ltd v. Plowman* that the efficacy of a private arbitration would be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration. (para 28)

(2) Documents generated for use at the arbitration hearing should remain private and confidential. There appeared to be no point in excluding third parties from an arbitration hearing, if they could use these documents without the permission of the party producing it. This would tantamount to opening the door of the arbitration venue to a third party and would serve to compromise the arbitration. (para 27)

(3) The second to fifth defendants who were not parties to the arbitration proceedings had used the impugned document without the permission of the plaintiffs or leave of court. Even if the impugned document contained information that was not inherently confidential or information that was already in the public domain, it was still subject to the obligation of privacy and was a document private to the parties to the arbitration and arbitral tribunal. The principle of privacy precludes third parties from making use of documents generated in arbitration proceedings outside the arbitration without the consent of the party producing it or the leave of court must be preserved and upheld. If the ends of justice require such documents to be disclosed in court proceedings between the parties or other third parties, then the court will be the arbiter of whether or not such disclosure ought to be permitted, provided an application is made to the court for that purpose. (paras 29 & 30)

Case(s) referred to:

AG v. Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 ***(refd)***
Ali Shipping Corp v. Shipyard Trogir (1998) 2 All ER 136 ***(refd)***
Coco v. AN Clerk (Engineers) Ltd 1969 RPC 41 ***(refd)***
Dolling-Baker v. Merrett (1991) 2 All ER 890 ***(refd)***
Esso Australia Resources Ltd v. Plowman (1995) 128 ALR 391 ***(refd)***
Extreme System Sdn Bhd v. Ho Hup Construction Co Bhd & Ors (No 4) [2011] 10 CLJ 186 ***(refd)***
Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2008] 1 LNS 222 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 41 r. 6

Other sources referred to:
Patrick Niell QC, *Confidentiality in Arbitration, (1996) 12 Arbitration International,* p 287

For the plaintiff - Stanley Isaacs (C Sivasankar with him); M/s Isaacs, Tan & Chu
For the 2nd to 4th defendants - Harjinder Kaur; M/s Shahrizat Rashid & Lee
For the 5th defendant - Mark La Brooy; M/s Raja Darryl & Loh

Reported by Kumitha Abd Majid

JUDGMENT

SM Komathy Suppiah JC:

[1] The plaintiffs seek leave pursuant to O. 41 r. 6 of the Rules of Court 2012 to expunge a document entitled respondents amended answer and counter-claim (hereinafter referred to as 'the impugned document'), which was exhibited to an affidavit deposed on behalf of the second to the fourth defendants and a further affidavit deposed on behalf of the fifth defendant. The impugned document was the plaintiff's claim in arbitration proceedings with the first defendant. By way of encls. 187 and 190, the plaintiffs apply for the following orders;

> Encl. 187 - for an order that para 17 of the affidavit of Yau Her Lerk affirmed on 10 April 2013 exhibiting the impugned document be expunged.
>
> Encl. 190 - for an order that para 13 of the affidavit of Hew Sheau Ying affirmed on 10 April 2013 exhibiting the affidavit of Yau Her Lerk and the impugned document be expunged.

Background Facts

[2] The plaintiffs commenced this suit against the six defendants premised on an allegation of fraudulent misrepresentation. The plaintiffs alleged that they were induced to consent to a settlement agreement dated 31 July 2008 with the first defendant based on certain misrepresentations made by the other defendants in this suit.

[3] The settlement agreement of 31 July 2008 contained, *inter alia*, an arbitration clause.

[4] Based on the arbitration clause in the settlement agreement, the first defendant applied for a stay of proceedings for the matter to be referred to arbitration in Singapore under the Rules of the International Chamber of Commerce (the ICC). The High Court dismissed the stay application, but on 26 April 2011, the Court of Appeal allowed the first defendant's appeal and stayed the proceedings against the first defendant for the matter to be referred to arbitration at the ICC. The plaintiff's application for leave to appeal to the Federal Court was refused.

[5] The first defendant then commenced arbitration proceedings in Singapore under the ICC Rules. The plaintiffs were the respondents and the first defendants the claimant in the arbitration proceedings. The plaintiffs then filed the impugned document in response to the claimants pleading.

[6] The second to the fourth defendants and the fifth defendant then filed two separate applications (encls. 171 and 174) to stay the proceedings against them pending the outcome of the arbitration between the plaintiffs and the first defendant. They allege that the arbitration proceedings and this civil suit raise similar issues and therefore overlap and in support of their assertion, have exhibited the impugned document to illustrate this. This is the document which the plaintiffs are seeking to expunge by way of encls. 187 and 190.

[7] Both Yau Her Lerk, and Hew Sheau Ying who are the deponents of the respective affidavits disclosing the impugned document are lawyers.

[8] The second to the fifth defendants are not parties to the arbitration proceedings.

Parties' Submissions

[9] Counsel for the plaintiffs took the position that at common law arbitration proceedings are private and that all documents produced or created for the purpose arbitration are confidential in nature and cannot be used by third parties. It was submitted that as the impugned document was a private document created by the plaintiff for the arbitration at ICC, the defendants who are not parties to the arbitration, required the prior leave of the court to use the impugned document in these proceedings. The plaintiffs

relied on three authorities in support of their proposition. They are *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor* [2008] 1 LNS 222; [2008] 5 MLJ 254, *Ali Shipping Corp v. Shipyard Trogir* [1998] 2 All ER 136 and *Dolling Baker v. Merrett* [1991] 2 All ER 890.

[10] The defendants did not dispute that this was the position under common law, but contended that the common law principles did not apply to the present case as the impugned document was not a confidential document as the information contained therein existed in the public domain, some three years before the impugned document was created. The defendants explained that in the year 2009, the information in the impugned document had entered the public domain when the plaintiffs instituted this suit by filing their statement of claim in court. It was said that as the information in the impugned document was similar to the plaintiffs statement of claim in this suit, it was no longer confidential information. In support of this proposition, reliance was placed on the decisions in *Coco v. AN Clerk (Engineers)* Ltd 1969 RPC 41, and *AG v. Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, and *Extreme System Sdn Bhd v. Ho Hup Construction Co Bhd & Ors (No 4)* [2011] 10 CLJ 186; [2010] MLJU 1608.

[11] Counsel for the defendant referred the court to a passage in *Coco*'s case, where the Meggary J held that (at 47):

> ... something which is public property and public knowledge cannot *per se* provide any foundation for proceedings for breach of confidence. However, confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge ...

[12] He also referred the following passage in *Guardian Newspapers*, where Lord Golf held (at 659) that:

> It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then as a general rule, the principle of confidentiality can have no application to it.

[13] Lastly, reliance was placed on a passage from the judgment of Mah Weng Kwai JC (as he then was) in *Extreme System*. It was held in relation to cause papers filed in court (at 5) that:

> ... SSM witnesses' affidavits, although not read in open court, are in the public domain and they are public documents pursuant to section 74 of the Evidence Act 1950 ...

[14] The second to fifth defendants argued that the common law position did not apply to the present case as the authorities cited by the plaintiffs did not consider the question of whether the rules of confidentiality would continue to apply to a document created for the purposes of arbitration but contained information which was already available in the public domain.

[15] The defendants further contended that the only purpose for disclosing the impugned document was to show that the proceedings before this court and before the arbitral tribunal in Singapore are similar and that there is a clear risk of inconsistent decisions if a stay is refused. The defendants were not seeking to use the impugned document in any collateral manner.

[16] Lastly, it was argued that there was no express provision in the ICC Rules that prohibited the use of the impugned document in these proceedings on the ground of confidentiality.

[17] In response to these submissions, the plaintiffs contended that the principles enunciated in the cases referred to by the defendants did not apply to arbitration proceedings as it was private and conducted on the basis that all documents generated for use at these proceedings were confidential and private. The plaintiffs urged the court not to permit the defendants to use the impugned document which had been obtained unlawfully without the permission of the plaintiffs.

The Law

[18] The ICC Rules do not expressly provide that documents generated for arbitration proceedings are confidential.

[19] The existence of an obligation of confidentiality not to disclose documents used in arbitration has been emphatically recognised by the English courts. In *Dolling-Baker v. Merrett* ([9]

supra) the English Court of Appeal considered whether a party to an arbitration agreement with a contracting party had to disclose the arbitration documents in litigation with a stranger to the arbitration. Parker LJ characterised the obligation of confidentiality as "an implied obligation arising out of the nature of arbitration itself". He explained (at 899):

> What is relied upon is, in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained.
>
> As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary just as it is in the case of the implied obligation of secrecy between banker and customer.
>
> It will be appreciated that I do not intend in the foregoing to give a precise definition of the extent of the obligation. It is unnecessary to do so in the present case. It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself.
>
> When a question arises as to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other

things, whether there are other and possibly less costly ways of obtaining the information which is sought and which do not involve any breach of the implied undertaking.

[20] In *Ali Shipping Corp v. Shipyard Trogir* (1998) 2 All ER 136, the Court of Appeal adopted a broader stance. Potter LJ in delivering the judgment of the court stated that the confidentiality rule arose as a matter of law:

> So far as the yard's submission (3) is concerned, I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of the arbitration outside the four walls of the arbitration, even when required for use in other proceedings (subject to the exceptions already discussed).
>
> In considering the question of relief, the court has not hitherto undertaken any detailed examination of the objecting party's motives for seeking to uphold such privacy. No doubt the court ordinarily acts on the working assumption that, in agreeing to arbitration, each party considers that his interests will be best served by privacy and that both parties recognise and undertake mutual obligations of confidentiality, subject only to such exceptions as the court may recognise. Because the doctrine rests upon the assumption that the parties have a legitimate interest in privacy which the court will protect, an exception based on the subsequent need to protect the inconsistent interest of one party alone is properly formulated in terms of reasonable necessity rather than mere convenience or advantage. Further, where exceptional circumstances are asserted, it will usually be appropriate for the court to limit its task to establishing whether such circumstances have been made out, and not to explore the motives of the objecting party or whether the court considers that his interests will in fact be prejudiced by disclosure. In the ordinary way, prejudice will be presumed and, unless excepting circumstances are established, confidentiality will be upheld.

[21] In *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor* [2008] 1 LNS 222; [2008] 5 MLJ 254, Malik Ishak J referred to *Dolling-Baker, Ali Shipping* and other cases on this subject and accepted that arbitrations in Malaysia are private and confidential. He said (at 277):

> The advantages of arbitration can never be listed with exactitude. Privacy of the hearing and confidentiality are two major benefits of arbitration.

Coleman J in *Hassneh Insurance Co of Israel & Ors v. Steuart J Mew* [1993] 2 43 at p. 247 aptly said in regard to privacy:

> If the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private. The assumption arises from a practice which has been universal in London for hundreds of years and, I believe, undisputed. It is a practice which represents an important advantage of arbitration over the courts as a means of dispute resolution. The informality attaching to a hearing held in private and the candour to which it may give rise is an essential ingredient of arbitration, ...

On confidentiality, I need to refer to the case of *Dolling-Baker v. Merrett Ors* [1991] 2 All ER 890; [1990] 1 WLR 1205 (CA) at p. 1213 which held that in the absence of an express term in an arbitration clause providing for confidentiality, then the presumption of confidentiality arises as an implied term by the very nature of the arbitral process itself.

It is now accepted, by all and sundry, that arbitrations are private and confidential (*Liverpool City Council v. Irwin & Anor* [1977] AC 239; [1976] 2 All ER 39 (HL), *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] AC 555; [1957] 1 All ER 125 (HL) and *Ali Shipping Corp v. Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314 (CA, Eng)). It is inconceivable that with all these endearing points, the plaintiff will not want to have access to arbitration.

[22] The following principles can be extracted from the authorities discussed. Firstly, that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.

[23] Secondly, that this obligation is not limited to documents which are *per se* confidential or to documents which contain material which are inherently confidential, such as trade or commercial secrets. It includes and extends to all documents generated in the course of arbitration. The obligation arises, not as a matter of business efficacy, but is implied as a matter of law.

[24] Thirdly, that disclosure of documents is permissible with the:

(a) Consent of the parties, express or implied;

(b) Order of court;

(c) Leave of court; and

(d) When it is reasonably necessary for the protection of the legitimate interest of an arbitrating party.

[25] It is interesting to note that the Australian High Court does not accept the English position that a duty of confidence is implied and imposed on the parties in arbitration proceedings. In *Esso Australia Resources Ltd v. Plowman* (1995) 128 ALR 391 at 401, Mason J declined to follow *Dolling-Baker*. He explained:

> I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.

[26] *Esso Australia* has been criticised by Patrick Neill QC ("Neill") in his article, *Confidentiality in Arbitration* (1996) 12 Arbitration International 287. Neill is unconvinced by the supposed distinction drawn between privacy and confidentiality.

[27] In my view, the English position is to be preferred as an arbitration hearing is a private process between the parties to an arbitration agreement to which third parties have no access. It stands to reason that documents generated for use at that hearing should remain private and confidential. There appears to be no point in excluding third parties from an arbitration hearing, if they can use these documents without the permission of the party producing it. This would tantamount to opening the door of the arbitration venue to a third party and would serve to compromise the arbitration.

My Decision

[28] It cannot be gainsaid that one of the attractions of arbitration is its privacy and this benefit would be negated if third parties are allowed to use documents created for use at these proceedings without any limitations. A principal reason the parties

to a contract have chosen arbitration is to ensure that the dispute is heard in private and remains private in all aspects. In the present case, the impugned document is a pleading in the arbitration. A pleading setting out the party's case is in my view an inherent part of a process that is private and not public. As acknowledged by Mason CJ in *Esso Australia*, "the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration".

[29] The second to the fifth defendants who are not parties to the arbitration proceedings have used the impugned document without the permission of the plaintiffs or leave of court. They seek to bring this case within the principles identified in *Coco* and *Guardian Newspapers*.

[30] I accept the submission of the plaintiffs that the principles set out in *Coco* and *Guardian Newspaper* have no application to arbitration proceedings. In my view, even if the impugned document contains information that is not inherently confidential or information that is already in the public domain, it is still subject to the obligation of privacy and is a document private to the parties to the arbitration and the arbitral tribunal. The principle of privacy precludes third parties from making use of documents generated in arbitration proceedings outside the arbitration without the consent of the party producing it or the leave of court must be preserved and upheld. If the ends of justice require such documents to be disclosed in court proceedings between the parties or other third parties then the court will be the arbiter of whether or not such disclosure ought to be permitted, provided an application is made to the court for that purpose.

[31] Thus, I allow both encl. 187 and 190 with costs of RM5,000 to the plaintiffs.